

Secretary's Order No.: **2007-W-0046**

RE: Subaqueous Lands and Water Quality
Certification Permit Application filed by the Delaware Division of Soil and
Water to construct a 12' x 35' kayak and canoe launch, filling 15.5 cubic
yards of subaqueous lands in Blackbird Creek, at 801 Blackbird Landing
Road, Blackbird Preserve, Townsend, New Castle County, Delaware

Date of Issuance: October 24, 2007

Effective Date: October 24, 2007

I. Background:

On Wednesday, August 15, 2007, the Department of Natural Resources and Environmental Control held a public hearing in the DNREC Richardson and Robbins Building Auditorium, 89 Kings Highway, Dover, Delaware, in order to receive comments and solicit the views of interested parties concerning the Subaqueous Lands and Water Quality Certification Permit Application filed by the Delaware Division of Soil and Water. This permit application is for construction of a 12' x 35' kayak and canoe launch, filling 15.5 cubic yards of subaqueous lands in Blackbird Creek, at 801 Blackbird Landing Road, Blackbird Creek

Preserve Component of the Delaware National Estuarine Research Reserve, Townsend, New Castle County, Delaware.

The proposed location for the aforementioned kayak and canoe launch is the Blackbird Creek Reserve parcel (once the Odessa Campground and referred to as the “Lowe Tract”), which was purchased in 2004 with grant funds from the National Estuarine Research Reserve System (hereafter referred to as “NERRS”) Construction and Land Acquisition program, with the intention of conducting research, education and land stewardship as it relates to the mission of the NERRS and the Delaware NERR in particular. Under the designation of the NERRS via Section 315 of the Coastal Zone Management Act (CZMA), in order for a NERR site to be established, the site and its activities must enhance public awareness and understanding of estuarine systems and provide for public education. One of the main objectives within the Coastal Zone Management Act is to “provide for public access to the coasts for recreational purposes”.

The Division of Soil and Water, as the Applicant in this permitting matter, believes that it has a responsibility, through the above referenced missions and establishment via the CZMA, to provide public access in an environmentally responsible manner while promoting wise stewardship of the resource. Although neighboring property owners expressed some concerns initially over the placement of the proposed launch (such as liability issues and trespassing), these concerns were thoroughly

addressed by the Department at the public hearing on August 15, 2007 to the satisfaction of those property owners. Proper notice of the hearing was provided, as required by law.

This hearing was conducted pursuant to the Subaqueous Lands Act, 7 Del.C., Chapter 72, as well as Chapter 60 of the Delaware Code. Proper notice of the hearing was provided, as required by law.

After the hearing, the Hearing Officer performed an evaluation of the evidence entered into the record in this matter. Thereafter, the Hearing Officer prepared her report and recommendation in the form of a Hearing Officer's Report to the Secretary dated October 18, 2007, and that Report, with its exhibits attached thereto, is expressly incorporated herein by reference.

II. Findings and Conclusions:

1. Proper notice of the hearing was provided as required by law.
2. The Applicant has reasonably justified the pending request for a permit application to construct a 12' x 35' kayak and canoe launch, filling 15.5 cubic yards of subaqueous lands in Blackbird Creek, at 801 Blackbird Landing Road, Blackbird Creek Preserve Component of the Delaware National Estuarine Research Reserve, Townsend, New Castle County, Delaware;
3. This proposed project has been reviewed in the light of the *Delaware Regulations Governing the Use of Subaqueous*

Lands, and has been evaluated based on public use impact and several environmental considerations;

4. The project has been designed to (1) minimize impacts to the environment; (2) benefit the public by providing a safe launch site for canoe paddlers and kayakers; and (3) preserve the aesthetic enjoyment of the area by utilizing eco-friendly materials;
5. The Applicant has also closely examined alternatives and chosen the best location for this launch on the property, based upon the mission of DNERR and the evaluation considerations of the regulations;
6. Initial public concerns over this proposed project expressed by adjacent land owners were assuaged by the Department by the time of the public hearing;
7. The on-going restoration, sound stewardship, and increased conservation efforts at the Blackbird Creek Reserve, including a low-impact canoe/kayak access, are all major improvements from that of decades of highly detrimental impacts from the old Odessa Campground;
8. It is in the public's interest for the Department to provide public access via public lands to public waters; and

9. The establishment of this launch will fill a public need, not only in the Blackbird Creek Watershed, but throughout the State of Delaware.

III. Order:

In view of the above findings, it is hereby ordered that the Subaqueous Lands and Water Quality Certification Permit Application filed by the Delaware Division of Soil and Water to construct a 12' x 35' kayak and canoe launch, filling 15.5 cubic yards of subaqueous lands in Blackbird Creek, at 801 Blackbird Landing Road, Blackbird Preserve, Townsend, New Castle County, Delaware. is hereby ***granted.***

IV. Reasons:

The Applicant has reasonably justified to the Department its request for a WSLS permit to construct the aforementioned kayak and canoe launch in Blackbird Creek, Townsend, Delaware, and the record developed during this public hearing process certainly warrants the granting of this permit to the Division of Soil and Water. Furthermore, the Applicant listened to the concerns of the public at the time of the hearing, and provided thorough responses to their questions raised about this project, thus resulting in those concerns being assuaged by the Department in this matter.

In granting this permit, the Department will effect a major improvement over that parcel of land previously known as the old Odessa Campground, and will continue the on-going restoration, sound

stewardship, and increased conservation efforts at the Blackbird Creek Reserve. The establishment of this launch is in the public's interest, as it will provide public access via public lands to public waters, and fill a public need, not only in the Blackbird Creek Watershed, but throughout the State of Delaware, in furtherance of the policy and purposes of 7 Del. C., Ch. 60.

/s/ John A. Hughes

John A. Hughes
Secretary

HEARING OFFICER'S REPORT

REGARDING: Subaqueous Lands and Water Quality
Certification Permit Application filed by the Delaware Division of Soil and Water to
construct a 12' x 35' kayak and canoe launch, filling 15.5 cubic yards of subaqueous
lands in Blackbird Creek, at 801 Blackbird Landing Road, Blackbird Preserve,
Townsend, New Castle County, Delaware

Lisa A. Vest
Hearing Officer

October 18, 2007

1. Background Findings:

On Wednesday, August 15, 2007, the Department of Natural Resources and Environmental Control held a public hearing in the DNREC Richardson and Robbins Building Auditorium, 89 Kings Highway, Dover, Delaware, in order to receive comments and solicit the views of interested parties concerning the Subaqueous Lands and Water Quality Certification Permit Application filed by the Delaware Division of Soil and Water. This permit application is for construction of a 12' x 35' kayak and canoe launch, filling 15.5 cubic yards of subaqueous lands in Blackbird Creek, at 801 Blackbird Landing Road, Blackbird Creek Preserve Component of the Delaware National Estuarine Research Reserve, Townsend, New Castle County, Delaware.

The proposed location for the aforementioned kayak and canoe launch is the Blackbird Creek Reserve parcel (once the Odessa Campground and referred to as the "Lowe Tract"), which was purchased in 2004 with grant funds from the National Estuarine Research Reserve System (hereafter referred to as "NERRS") Construction and Land Acquisition program, with the intention of conducting research, education and land stewardship as it relates to the mission of the NERRS and the Delaware NERR in particular. Under the designation of the NERRS via Section 315 of the Coastal Zone Management Act (CZMA), in order for a NERR site to be established, the site and its activities must enhance public awareness and understanding of estuarine systems and provide for public education. One of the main objectives within the Coastal Zone Management Act is to "provide for public access to the coasts for recreational purposes".

The Division of Soil and Water, as the Applicant in this permitting matter, believes that it has a responsibility, through the above referenced missions and establishment via the CZMA, to provide public access in an environmentally responsible manner while promoting wise stewardship of the resource. However, neighboring property owners expressed concerns over the placement of the proposed launch, such as liability issues and trespassing. These public concerns, along with the Department's responses to the same, will all be addressed in greater detail below. Proper notice of the hearing was provided, as required by law.

II. Summary of Record:

After some brief introductory remarks from Laura Herr, Section Manager of the Department's WLSL Section, the floor was turned over to Joanne Haughey, Environmental Scientist with WLSL, who introduced the Department's twelve (12) exhibits for the record. Immediately thereafter, Katy O'Connell, Environmental Program Manager for the Delaware NERR, made her presentation on behalf of the Applicant in this matter.

Ms. O'Connell stated that the Delaware NERR supports the installation of this proposed canoe/kayak launch for the benefit and use of Delaware residents and recreational visitors to the State, as they find this project in keeping with the coastal management policies adopted by the National Oceanic and Atmospheric Administration, based on the Delaware General Assembly's Recreational and Conservation Lands Policies (Authority: 7 Del.C. §7502). The Recreational and Conservation Lands Policies addresses the provision for lands for public recreation and conservation of natural

resources, promoting biological diversity, public health, prosperity, and general welfare, and the same is the proper responsibility of the Government. The Applicant stated that lands now provided for such purposes will not be adequate to meet the needs of an expanding population in years to come. Ms. O’Connell also noted that it is the public policy of the State of Delaware and its political subdivisions that the preservation of open spaces shall be accomplished through the acquisition of interests or rights in real property, or through the donation of said lands, and that such acquisitions constitute a public purpose, for which public funds have been expended or advanced, and should be continued.

Ms. O’Connell also referenced the policy of Public Trust Doctrine applying to this present application, as the public has a right of navigation and fishery on all streams where the tide ebbs and flows, even though the riparian proprietor’s lines cover the place; but they have no right to land fish on private property, above the high water mark (Authority – *Bickel v. Polk*, Del.Supr. 5 Harr. 325 [1851]). She further noted that public access to the water is a public trust right of Delawareans, and this is best done at appropriate areas in accordance with the Public Trust Doctrine and the public’s right to access and use of navigable waters in a thoughtful, environmentally appropriate means. It is, Ms. O’Connell stated, also most appropriate from publicly owned lands. The Applicant believes that the establishment of the proposed launch will meet these public policy objectives.

In turning to the public concerns received from the Department regarding liability issues and trespassing, Ms. O’Connell stated that the Applicant relies upon their understanding of 7 Del.C., Ch. 29, “Public Recreation on Private Lands”, which they

argue holds that land owners are not liable for any hazards experienced by recreational users of the waterway who trespass on private lands. Based upon the relevant portion of the Recreational Use Statute, the Applicant noted that people entering and using privately-owned lands for recreational purposes are responsible for exercising due care in their use of that said land. Land owners do not have to make their lands and water areas available, yet Public Trust Doctrine still applies, as this is yet another policy objective of the Delaware General Assembly to promote public access for recreational opportunities.

In her presentation at the hearing, Ms. O'Connell also touched upon the concerns voiced by the local land owners regarding the public property across the road from their homes, referred to by the Delaware NERR as the Rushton Tract. The Applicant states that the proposed project does not directly impact the permit application, as there are no proposed permitted activities taking place there. This site was originally purchased to provide public access as a result of recommendations from a Federal Section 312 review, the tri-annual review of the Delaware NERR. Initially, this parcel was used by Delaware NERR for its own educational programs, including canoe and kayak programs and invasive species were eradicated to provide public access leaving the site in its current, mostly mowed, state.

Currently, paddlers and other boaters are pulling off the road in front of the gate at Rushton and putting canoes and kayaks in the water from that location, often because at low tide it is more accessible with that of the Lowe Tract. With the purchase of the Lowe Tract, the Applicant's focus for water access shifted. The Division of Soil and Water states that the Lowe Tract provides more appropriate access, because it provides for more appropriate parking and a more appropriate access point in general. Paddlers will

still need to portage their vessels approximately 700 feet to the proposed launch site, thus avoiding the likelihood of any motorized boats using the property. Should the permit application be denied, then the Applicant noted that it will need to reconsider the reopening of the Rushton Tract and use for its original intent. Ms. O'Connell stated that they have encouraged the property owners to contact the Reserve should they see any illegal activity occurring on the DNERR lands, as then DNERR would be able to contact DNREC enforcement to respond to complaints. To date, however, no calls have been received.

With regard to future plans, Ms. O'Connell noted that the Delaware Coastal Programs, including the DNERR, is embarking on the development of a Blackbird Creek and Appoquinimink River Water Access Plan, which will set forth an education and outreach plan to promote wise stewardship of the watersheds as it relates to boating, traditional uses (such as fishing and hunting), environmental concerns, and private property rights. Once completed, the plan will consist of an inventory of regional access points and potential passive recreation points. A public access guide will be developed for the appropriate use of these sites. Ms. O'Connell envisions that the DNERR will conduct several trainings per year on this topic from the Blackbird Creek Reserve Site. Additionally, they will continue to offer guided canoe and kayak programs which will teach appropriate paddling techniques, safety and environmental ethics.

In closing its presentation, the Applicant stated that this project has been designed to minimize impacts to the environment, to benefit the public by providing a safe launch point for canoe paddlers and kayakers, and to preserve the aesthetic enjoyment of the area by utilizing eco-friendly materials which blend in well with the shoreline of Blackbird

Creek. Furthermore, the Applicant has also closely examined alternatives, and believes that it has chosen the best location for this launch on the property, based on the mission of the reserve and the evaluation and consideration of the regulations. Moreover, the Applicant believes that the ongoing restoration, sound stewardship and increased conservation efforts at the Blackbird Creed Reserve, including a low-impact canoe/kayak access, are major improvements from that of decades of highly detrimental impacts from the old Odessa Campground. Finally, they believe it is in the public's interest to provide public access via public lands to public waters, and that the establishment of this launch will fulfill a public need not only in the Blackbird Creek watershed, but throughout the State of Delaware.

In support of the Applicant's presentation, Ms. O'Connell provided three items to be submitted as part of the record, as follows: (1) copy of the official comments made by herself, with expanded notes; (2) a survey map and accompanying key of the Lowe tract (the parcel proposed for the launch site; and (3) seven photographs of the launch site, with an accompanying key. The Hearing Officer entered these items into the record, and the same are attached hereto for the Secretary's review as Attachment "A".

Turning toward the public comment portion of the public hearing held on August 15, 2007, there were several members of the public who offered their opinions regarding the proposed project. Debbie Heaton expressed how much she enjoys getting to know the Blackbird Creek watershed as she explores it via canoeing and hiking, and that although she understands there are several families who are concerned about the increased use of Blackbird Creek by canoe and kayak this proposed ramp will allow, she does not feel that the 15.5 cubic yards of fill to create the launch area will have a

measurable impact on the creek, nor does she believe that the canoeists and/or kayakers pose a risk for the nearby landowners. Ms. Heaton believes that this launch will allow the staff of the Reserve to more easily take small groups out on the creek to learn more about the special habitat Blackbird Creek provides to the watershed's plants, animals and human residents, and urged DNREC to approve this pending application.

Other members of the public, including landowners and local residents of Townsend, voiced support for the approval of this present WSLs Permit Application. Those who were kind enough to take the time to submit their comments regarding this project in writing had their comments admitted into the record by this Hearing Officer, and the same are attached hereto for the Secretary's review as Attachment "B".

There were two other people who spoke at the hearing, Larry and Amanda Johnston. Mr. and Mrs. Johnston were actually two of the people who contacted the Department and requested that a public hearing be held on this pending application. Speaking first, Mrs. Johnston cited their concerns about this project to be centered around (1) the aforementioned liability issues; and (2) the increase of cars on the side of the road, the graffiti, and trash on the road that people are already leaving there.

With regard to the liability issues referenced previously in this report, Mrs. Johnston stated that they feel those concerns have now been resolved, based upon the information that has been provided to them by the Department. The other concerns, however, were still existent. Mrs. Johnston noted that this proposed launch is going to be very visible to the bridge where people pull off on the side of the road and stand. She would personally like to see the launch site moved down a bit so that it is not as visible, so as not to encourage even more people coming over to the bridge. She noted that

people on the road have to literally swerve to avoid people, and her concern is that sooner or later, someone is going to get hurt. Mrs. Johnston also noted that they were given a number by the Department to call if they wanted to report anything. They were also apparently told by Department staff that Enforcement Officers would be patrolling that area, but they have never seen any officers in that area to tell anyone to move their cars or leave. She then provided seven photographs depicting the area across from the proposed site, which this Hearing Officer entered into the record as "Johnston Exhibit #1". These photographs depict cars parked in a "No Parking" area, as well as traffic congregated along the proposed site and people walking and/or standing and sitting at the bridge along the road. These photographs are attached hereto as Attachment "C" for the Secretary's review.

Mr. Johnston then commented that his major concern has always been the liability issues referenced earlier in this report. He noted that he initially met with the Department to review the proposed project and voice his concerns back in February of this year, and then again at another meeting in April. At no time were his liability concerns addressed. Only until he retained a private attorney and discussed his concerns with counsel did he learn that he would not be held liable. Then, two weeks before this public hearing, he states that he finally heard from the Department that he would not be held liable. Mr. Johnson thinks that it is great that people enjoy Blackbird Creek, and that is why he moved there himself. However, he does believe that the parking issue needs to be addressed, and that the Department should police it more, due to the safety hazards from the traffic as voiced by his wife before him. He also stated that, if the Department had

addressed his concerns back in February, he probably would not have requested the hearing.

In response to the Johnstons' concerns, Ms. O'Connell stated that part of the reason for the newly-proposed launch site is that there is adequate parking at the Reserve for this launch. According to Ms. O'Connell, the parking that occurs along the bridge, as well as some of the other areas noted by the Johnstons, are out of the Department's jurisdiction, because they are DeIDOT easements, and therefore DNREC cannot truly police those areas. As for the issue with the Rushton property, Ms. O'Connell noted that it has not been an access area to date, because they have not had a properly installed launch site from which to launch. DNERR fully intends that, once the launch site is installed, there will be amenities to that site to force paddlers to use the actual launch site.

Immediately following those comments, Ms. Herr, WSLs Section Manager for the Department, formally apologized to the Johnstons for the delay in getting the requested information to them. Moreover, insofar as the concerns of liability, Ms. Herr stated that the Department was not aware of that law back in February, and that it was actually Mr. Andrew Manis from the Nature Conservancy who brought it to WSLs's attention. Had she known of that particular law's existence, she would have provided it to the Johnstons, thus alleviating their concerns with regard to that issue.

III. Findings

In their presentation, the Applicant references several considerations and/or concerns that were studied by the Department during the creation of this proposed construction project. For the benefit and clarity of the record, the same shall be discussed herein at this time:

A. **Ownership of Lands:**

Initially, the neighboring property owners expressed their opinion that they own to the centerline of Blackbird Creek. Based on information in the 1959 deed encompassing the Gestwicki and Johnston parcels, it appears that those parcels, as part of the original property, extend to the boundary of Blackbird Creek, which is typically mean low water. It is the understanding of WSLS that the language asserting ownership to the centerline of the creek was incorporated into the deeds for the parcels after the original property had been sub-divided. Thus, it would appear that the ownership of underwater lands to the centerline of the creek was improperly deeded at the time of subdivision and the underwater land channel ward of the mean low water line is actually under the ownership of the citizens of the State of Delaware, which in turn is managed by the State of Delaware for its citizens.

B. **Coastal Management Policy/Public Trust Doctrine Policy:**

As noted previously, public access to the water is a public trust right of Delawareans. The public have a right of navigation and fishery on all streams where the tide ebbs and flows (see *Bickel*). This proposed project has been developed with the public's rights in mind, namely, to access and use navigable waters in a thoughtful and environmentally appropriate means, and the establishment of the proposed launch should meet these public policy objectives.

C. **Liability Concerns of Adjacent Landowners:**

Although adjacent landowners initially expressed concerns over liability should users of the launch trespass on their lands, the Department has shown its reliance on Title

7 of the Delaware Code, specifically, Chapter 29, “Public Recreation on Private Lands”.

That relevant portion of 7 Del.C., Ch. 29, states in pertinent part:

The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes, whether such persons entered upon the land of the owner with or without consent of the owner.

Under this Recreational Use Statute, the Department holds that landowners are not liable for any hazards experienced by recreational users of the waterway who trespass on private lands. People entering and using privately owner lands for recreational purposes are responsible for exercising due care in the use of the land. Landowners do not have to make their lands and water areas available, yet Public Trust Doctrine still applies. This, according to the Department, is yet another policy objective of the Delaware General Assembly to promote public access for recreational purposes.

D. **Location of Launch Site:**

The proposed launch site as referenced in this present permit application was originally selected for several reasons. There would be no direct impact to wetland plant communities. Tree removal would not be necessary, as the site is easily accessible. The proposed location required the least amount of fill in Subaqueous Lands. There was a gradual slope at the site, which was more conducive for a small launch. Lastly, it was within a walking distance from the parking area, but was too far to realistically portage a motor boat.

Although the DNERR staff hiked the entire property to look for another viable location for the launch, the first location originally selected was the only viable option. Other sites on the property would disrupt significant wetland plant communities; result in the removal of trees; be too steep and require an excessive amount of fill and/or clearing of soil; and be too far to portage a vessel from the established parking area. Additionally, the Applicant believed that moving the ramp from the originally selected location slightly down stream would not make it less visible from the bridge, and would involve disturbing more upland and wetland habitat. For the launch to be completely out of the sight of the bridge, it would have to traverse large expanses of state mapped tidal marsh and would require authorization under Title 7, Part VII, Ch. 66 of the Delaware Code for a wetland walkway at least 125 feet in addition to the launch. A wetland walkway of this magnitude would have a negative impact to the wetlands along this area of Blackbird Creek, including direct impact to vegetation during construction, fragmentation of an undisturbed marsh, and the likely increased presence of *Phragmites australis* further channelward, as *Phragmites* thrive in disturbed areas.

Thus, given the minimal environmental impacts, the Department decided on the present location for this launch site.

IV. Conclusions and Recommendations:

As noted above, it is the purpose of this Department to protect Delaware's natural resources throughout the State of Delaware. When reviewing this application in the light of the *Delaware Regulations Governing the Use of Subaqueous Lands* (adopted 1991 and amended 1992), it appears that this proposed project has been evaluated based on public use impact and several environmental considerations, and that the project has been

designed to (1) minimize impacts to the environment; (2) benefit the public by providing a safe launch site for canoe paddlers and kayakers; and (3) preserve the aesthetic enjoyment of the area by utilizing eco-friendly materials. The Applicant has also closely examined alternatives and chosen the best location for this launch on the property, based upon the mission of DNERR and the evaluation considerations of the regulations. Lastly, the concerns of the adjacent homeowners were taken into consideration by the Applicant, and by the time the public hearing was held, those concerns had been assuaged.

Based on the record developed in the course of this hearing, it is my opinion that the Applicant has reasonably justified the pending request for a permit application to construct a 12' x 35' kayak and canoe launch, filling 15.5 cubic yards of subaqueous lands in Blackbird Creek, at 801 Blackbird Landing Road, Blackbird Creek Preserve Component of the Delaware National Estuarine Research Reserve, Townsend, New Castle County, Delaware. Therefore, I hereby recommend that this permit application be *approved*. I also recommend that the following findings be made with regard to this matter:

1. Proper notice of the hearing was provided, as required by law.
2. The Applicant has reasonably justified the pending request for a permit application to construct a 12' x 35' kayak and canoe launch, filling 15.5 cubic yards of subaqueous lands in Blackbird Creek, at 801 Blackbird Landing Road, Blackbird Creek Preserve Component of the Delaware National Estuarine Research Reserve, Townsend, New Castle County, Delaware;

3. This proposed project has been reviewed in the light of the *Delaware Regulations Governing the Use of Subaqueous Lands*, and has been evaluated based on public use impact and several environmental considerations;
4. The project has been designed to (1) minimize impacts to the environment; (2) benefit the public by providing a safe launch site for canoe paddlers and kayakers; and (3) preserve the aesthetic enjoyment of the area by utilizing eco-friendly materials;
5. The Applicant has also closely examined alternatives and chosen the best location for this launch on the property, based upon the mission of DNERR and the evaluation considerations of the regulations;
6. Initial public concerns over this proposed project expressed by adjacent land owners were assuaged by the Department by the time of the public hearing;
7. The on-going restoration, sound stewardship, and increased conservation efforts at the Blackbird Creek Reserve, including a low-impact canoe/kayak access, are all major improvements from that of decades of highly detrimental impacts from the old Odessa Campground;
8. It is in the public's interest for the Department to provide public access via public lands to public waters; and
9. The establishment of this launch will fill a public need, not only in the Blackbird Creek Watershed, but throughout the State of Delaware.

In addition, I recommend issuing the attached Secretary's Order to effectuate this purpose and adopting the Hearing Officer's findings and conclusions as expressed hereinabove.

/s/ Lisa A. Vest
LISA A. VEST,
Hearing Officer